person--entirely apart from the FOIA context--to request that an agency review its national security records for declassification.[163] Traditionally, the mandatory review program has been used by researchers interested in gaining access to papers maintained by presidential libraries, which are not accessible under the FOIA. Unlike under the FOIA, such requesters do not have the right to judicial review of an agency's action.[164] In contrast to predecessor Executive Order 12,356, Executive Order 12,958 authorizes persons to appeal an agency decision under this program to the Interagency Security Classification Appeals Panel.[165]

Another difference between Executive Order 12,958 and its predecessor is that under the latter only a United States citizen, resident alien, federal agency, or state or local government could file a mandatory review request;[166] under Executive Order 12,958, there is no such restriction.[167] To alleviate some of the burden of this program, Executive Order 12,958 contains a provision that allows an agency to deny a mandatory review request if it has already reviewed the information for declassification within the past two years.[168]

For declassification decisions, Executive Order 12,958 authorizes agencies to apply a balancing test--i.e., to determine "whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure."[169] Though Executive Order 12,958 specifies that this provision is implemented as a matter of administrative discretion and creates no new right of judicial review, it is significant that no such provision existed under Executive Order 12,356.[170]

Additional Considerations

Two additional considerations addressed by Executive Order 12,958 have already been recognized by the courts. First, the "Glomar" response, discussed under In Camera Submissions above, is explicitly incorporated into the order:

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[163] See id.

[164] Id.; cf. Miller v. Casey, 730 F.2d 773, 778 (D.C. Cir. 1984) (refusing to review CIA decision to deny access to records under agency's discretionary "historical research program").

[165] Compare Exec. Order No. 12,958, § 3.6(b)(4), (d) (authorizing appeals of agency mandatory review actions to interagency panel), with Exec. Order No. 12,356, § 3.4(d) (providing for appeals procedure within agencies only).

[166] Exec. Order No. 12,356, § 3.4(a)(1).

[167] Exec. Order No. 12,958, § 3.6.

[168] Id. § 3.6(a)(3).

[169] Id. § 3.2(b).

[170] See FOIA Update, Spring/Summer 1995, at 11 (chart comparing provisions of Exec. Order No. 12,958 with those of Exec. Order No. 12,356).

"An agency may refuse to confirm or deny the existence or nonexistence of requested information whenever . . . its existence or nonexistence is itself classified under this order."[171]

Second, the "mosaic" or "compilation" approach--the concept that apparently harmless pieces of information, when assembled together, could reveal a damaging picture--is recognized in Executive Order 12,958 in a somewhat more restrictive form than in predecessor Executive Order 12,356.[172] Under Executive Order 12,958, compilations of otherwise unclassified information may be classified only if the "compiled information reveals an additional association or relationship that: (1) meets the [order's classification] standards; and (2) is not otherwise revealed in the individual items of information."[173] The "mosaic" approach was presaged by a decision of the Court of Appeals for the District of Col-

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[171] Exec. Order No. 12,958, § 3.7(a), 3 C.F.R. 333, 347 (1996), reprinted in 50 U.S.C. § 435 note (Supp. I 1996) and in FOIA Update, Spring/Summer 1995, at 9; see, e.g., Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 417 (2d Cir. 1989) (determining that fact of presence of nuclear weapons aboard particular naval ships is classified in itself); Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984) (ruling that whether CIA conducted covert activities in Albania following World War II is classified in itself); Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) (fact that, even under prior executive order, "existence or non-existence" of intercept by NSA of cable purportedly sent by Jack Ruby's brother to Cuba prior to Kennedy assassination classified); Nayed v. INS, No. 91-0805, 1993 WL 524541, at *2 (D.D.C. Nov. 29, 1993) (request for records on former Libyan national denied entry into United States); D'Aleo v. Department of the Navy, No. 89-2347, 1991 U.S. Dist. LEXIS 3884, at **4-5 (D.D.C. Mar. 27, 1991) (holding that any confirmation or denial of existence of nondisclosure agreement allegedly signed by plaintiff would cause serious damage to national security); Nelson v. United States Dep't of Justice, No. 1:90-1119, slip op. at 1-3 (N.D. Ga. Sept. 12, 1990) (fact of existence of records agency might possess under Foreign Intelligence Surveillance Act itself classified), aff'd, 953 F.2d 650 (11th Cir. 1992) (unpublished table decision); Marrera v. United States Dep't of Justice, 622 F. Supp. 51, 53 (D.D.C. 1985) (same); see also Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982) (Exemptions 1 and 3); cf. Hunt v. CIA, 981 F.2d 1116, 1118-20 (9th Cir. 1992) (holding agency's refusal to confirm or deny existence of records pertaining to Iranian national requested by person on trial for murder of that Iranian proper pursuant to Exemption 3).

[172] Compare Exec. Order No. 12,958, § 1.8(e) ("compilations of items of information which are individually unclassified may be classified if the compiled information reveals an additional association or relationship"), with Exec. Order No. 12,356, § 1.3(b), 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 435 note (1994) ("information . . . shall be classified when . . . its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security").

[173] Exec. Order No. 12,958, § 1.8(e).

umbia Circuit in 1980[174] and has been subsequently endorsed by the same court.[175] The D.C. Circuit has also reaffirmed that even if there is other information that if released "would pose a greater threat to the national security," Exemption 1 "`bars the government from prying loose even the smallest bit of information that is properly classified.'"[176]

Another point to remember under Exemption 1 is the requirement that agencies segregate and release nonexempt information, unless the segregated information would have no meaning.[177] The duty to release information that is

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[174] Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) (observing that "[e]ach individual piece of intelligence information, much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself").

[175] See Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (explicitly acknowledging "mosaic-like nature of intelligence gathering") (decided under Exec. Order No. 12,065); see also CIA v. Sims, 471 U.S. 159, 178 (1985) (Exemption 3); American Friends Serv. Comm. v. DOD, 831 F.2d 441, 444-45 (3d Cir. 1987) (recognizing "compilation" theory) (decided under Exec. Order No. 12,356); Taylor v. Department of the Army, 684 F.2d 99, 105 (D.C. Cir. 1982) (upholding classification of compilation of information on army combat units) (decided under Exec. Order No. 12,065); National Sec. Archive v. FBI, 759 F. Supp. 872, 877 (D.D.C. 1991) (adjudging that disclosure of code names and designator phrases could provide hostile intelligence analyst with "common denominator" permitting analyst to piece together seemingly unrelated data into snapshot of specific FBI counterintelligence activity) (decided under Exec. Order No. 12,356); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 709-10 (W.D.N.Y. 1991) (upholding classification of any source-identifying word or phrase, which could by itself or in aggregate lead to disclosure of intelligence source) (decided under Exec. Order No. 12,356).

[176] Abbotts v. NRC, 766 F.2d 604, 608 (D.C. Cir. 1985) (quoting Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)) (decided under Exec. Order No. 12,356).

[177] See, e.g., Doherty v. United States Dep't of Justice, 775 F.2d 49, 53 (2d Cir. 1985); Paisley v. CIA, 712 F.2d 686, 700 (D.C. Cir. 1983); Armstrong v. Executive Office of the President, 897 F. Supp. 10, 17 (D.D.C. 1995) (Vaughn Index and supporting affidavits demonstrate that limited number of country captions and source citations contained in intelligence summaries are so "inextricably intertwined" with text of summaries as to be exempt from disclosure); Bevis v. Department of the Army, No. 87-1893, slip op. at 2 (D.D.C. Sept. 16, 1988) (ruling that redaction not required when it would reduce balance of text to "unintelligible gibberish"); American Friends Serv. Comm. v. DOD, No. 83-4916, 1988 WL 82852, at *4 (E.D. Pa. Aug. 4, 1988) (very fact that records sought would have to be extensively "reformulated, re-worked and shuffled" prior to any disclosure established that nonexempt material was "inextricably intertwined" with exempt material), aff'd, 869 F.2d 587 (3d Cir. 1989)

(continued...)

"reasonably segregable"[178] applies in cases involving classified information as well as cases involving nonclassified information.[179] During the past several years, the D.C. Circuit has reemphasized the FOIA's segregation requirement in a series of decisions,[180] one of which involved records withheld pursuant to Exemption 1.[181] In that Exemption 1 decision, the D.C. Circuit, although upholding the district court's substantive determination that the records contained information qualifying for Exemption 1 protection, nonetheless remanded the case to the district court because it had failed to "make specific findings of segregability for each of the withheld documents."[182]

As a final matter, agencies should be aware of the FOIA's "(c)(3) exclu-

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[177](...continued)
(unpublished table decision).

[178] 5 U.S.C. § 552(b) (sentence immediately following exemptions) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[179] See, e.g., Oglesby v. United States Dep't of the Army, 920 F.2d 57, 66 n.12 (D.C. Cir. 1990) (dictum) (noting failure of Army affidavit to specify whether any reasonably segregable portions of 483-page document were withheld pursuant to Exemption 1); Ray v. Turner, 587 F.2d 1187, 1197 (D.C. Cir. 1978) (remanding for greater specificity in affidavit because agency may not rely on "exemption by document" approach even in Exemption 1 context); see also Harper v. DOD, No. 93-35876, 1995 WL 392032, at *2 (9th Cir. July 3, 1995) (reversing part of district court order which permitted agency to withhold entire report under Exemption 1, because district court failed to make "necessary findings" on segregability).

[180] See Army Times Publ'g Co. v. Department of the Air Force, 998 F.2d 1067, 1068, 1071-72 (D.C. Cir. 1993); Krikorian v. Department of State, 984 F.2d 461, 466-67 (D.C. Cir. 1993); PHE, Inc. v. Department of Justice, 983 F.2d 248, 252-53 (D.C. Cir. 1993); Schiller v. NLRB, 965 F.2d 1205, 1210 (D.C. Cir. 1992).

[181] See Krikorian, 984 F.2d at 466-67; see also Canning v. United States Dep't of Justice, 848 F. Supp. 1037, 1049 n.2 (D.D.C. 1994) (applying Krikorian standard to specifically find that agency "carefully and methodically . . . respect-[ed FOIA's segregation] principle"); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, No. C89-1843, slip op. at 7-8, 11-12 (N.D. Cal. June 4, 1993) (applying same standard).

[182] Krikorian, 984 F.2d at 467; see FOIA Update, Summer/Fall 1993, at 11-12 ("OIP Guidance: The `Reasonable Segregation' Obligation"); see also Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 4-5 (stressing importance of segregation in connection with "foreseeable harm" standard); FOIA Update, Spring 1994, at 3 (observing that harm element is "already built into" Exemption 1).

sion."[183] This special record exclusion applies to certain especially sensitive records maintained by the Federal Bureau of Investigation which pertain to foreign intelligence, counterintelligence or international terrorism matters. Where the existence of such records is itself a classified fact, the FBI may, so long as the existence of the records remains classified, treat the records as not subject to the requirements of the FOIA. (See discussion under Exclusions, below.)

EXEMPTION 2

Exemption 2 of the FOIA exempts from mandatory disclosure records "related solely to the internal personnel rules and practices of an agency."[1] Courts have interpreted the exemption to encompass two distinct categories of information:

(a) internal matters of a relatively trivial nature--sometimes referred to as "low 2" information; and

(b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement--sometimes referred to as "high 2" information.[2]

For a long time, much confusion existed concerning the intended coverage of Exemption 2, due to the differing ways in which Exemption 2 was addressed in the Senate and House Reports when the FOIA was enacted. The Senate Report stated:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.[3]

The House Report provided a more expansive interpretation of Exemption 2's coverage, stating that it was intended to include:

> [o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners . . . but [that] this exemption would

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[183] 5 U.S.C. § 552(c)(3); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 24-25 (Dec. 1987).

[1] 5 U.S.C. § 552(b)(2) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[2] See FOIA Update, Summer 1989, at 3; see, e.g., Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (describing "low 2" and "high 2" aspects of exemption); Jett v. United States Dep't of Justice, No. 93-A-515-N, slip op. at 9 (M.D. Ala. Dec. 20, 1993) (same).

[3] S. Rep. No. 89-813, at 8 (1965).

> not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under present law.[4]

The Supreme Court confronted the conflict in Exemption 2's coverage of routine internal matters in a case in which a requester sought to obtain case summaries of Air Force Academy ethics hearings, and it found the Senate Report to be more authoritative. In Department of the Air Force v. Rose,[5] the Supreme Court construed Exemption 2's somewhat ambiguous language as protecting internal agency matters so routine or trivial that they could not be "subject to . . . a genuine and significant public interest."[6] The Court declared that Exemption 2 was intended to relieve agencies of the burden of assembling and providing access to any "matter in which the public could not reasonably be expected to have an interest."[7] At the same time, presaging the eventual development of "high 2," the Court also suggested in Rose that the policy enunciated by the House Report might permit an agency to withhold matters of some public interest "where disclosure may risk circumvention of agency regulation."[8]

The Supreme Court's ruling in Rose helped to define the contours of Exemption 2, but did not dispel all the confusion about its scope. Early judicial opinions, particularly in the Court of Appeals for the District of Columbia Circuit, revealed that courts were unsure whether the exemption covered only internal personnel rules and personnel practices of an agency or, on the other hand, an agency's internal personnel rules and more general internal practices.[9] This confusion was finally laid to rest, at least in the D.C. Circuit, in Founding Church of Scientology v. Smith,[10] which articulated the following test for Exemption 2 coverage:

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[4] H. Rep. No. 89-1497, at 10 (1966), reprinted in 1996 U.S.C.C.A.N. 2418, 2427.

[5] 425 U.S. 352 (1976).

[6] Id. at 369.

[7] Id. at 369-70.

[8] Id. at 369.

[9] Compare Jordan v. United States Dep't of Justice, 591 F.2d 753, 764 (D.C. Cir. 1978) (en banc) (exemption covers only internal personnel matters), and Allen v. CIA, 636 F.2d 1287, 1290 (D.C. Cir. 1980) (exemption covers nothing more than trivial administrative personnel rules), with Lesar v. United States Dep't of Justice, 636 F.2d 472, 485 (D.C. Cir. 1980) (exemption covers routine matters of merely internal interest), and Cox v. United States Dep't of Justice, 601 F.2d 1, 4 (D.C. Cir. 1979) (per curiam) (same). See generally DeLorme Publ'g Co. v. NOAA, 917 F. Supp. 867, 875-76 & n.10 (D. Me. 1996) (describing debate among various circuit courts on meaning of Exemption 2 language), appeal dismissed per stipulation, No. 96-1601 (1st Cir. July 8, 1996).

[10] 721 F.2d 828 (D.C. Cir. 1983).

> First, the material withheld should fall within the terms of the statutory language as a personnel rule or internal practice of the agency. Then, if the material relates to trivial administrative matters of no genuine public interest, exemption would be automatic under the statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.[11]

"Low 2": Trivial Matters

Exemption 2 of the FOIA protects from disclosure internal matters of a relatively trivial nature.[12] As its legislative and judicial history make clear, in this "low 2" aspect Exemption 2 is the only exemption in the FOIA having a conceptual underpinning totally unrelated to any harm caused by disclosure per se.[13] Rather, this aspect of the exemption is based upon the unique rationale that the very task of processing and releasing some requested records would place an administrative burden on the agency that would not be justified by any genuine public benefit.[14] As such, this part of Exemption 2 is entirely subject to the policy of discretionary agency disclosure.[15]

For information to fall within Exemption 2, it must qualify as a personnel

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[11] Id. at 830-31 n.4; see also Massey v. FBI, 3 F.3d 620, 622 (2d Cir. 1993) (holding that Exemption 2 applies to "non-employee information," such as informant symbol numbers and file numbers); Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (declaring Exemption 2 appropriate to withhold Equal Access to Justice Act litigation strategies); Dirksen v. HHS, 803 F.2d 1456, 1458-59 (approving use of Exemption 2 to withhold Medicare claims-processing guidelines). But see Audubon Soc'y v. United States Forest Serv., 104 F.3d 1201, 1204 (10th Cir. 1997) (ruling that Exemption 2 may be applied only to documents related to "personnel practices" of agency).

[12] See, e.g., Department of the Air Force v. Rose, 425 U.S. 352, 369-70 (1976); Lesar v. United States Dep't of Justice, 636 F.2d 472, 485 (D.C. Cir. 1980).

[13] See Rose, 425 U.S. at 369-70.

[14] See FOIA Update, Winter 1984, at 10-11 ("FOIA Counselor: The Unique Protection of Exemption 2"); see, e.g., Martin v. Lauer, 686 F.2d 24, 34 (D.C. Cir. 1982) (Exemption 2 "serves to relieve the agency from the administrative burden of processing FOIA requests when internal matters are not likely to be the subject of public interest."); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 10 n.8 (D.D.C. 1991) (citing Martin, 686 F.2d at 34), aff'd, 968 F.2d 92 (D.C. Cir. 1992) (unpublished table decision).

[15] See FOIA Update, Spring 1994, at 3 (emphasizing that agencies should apply discretionary disclosure policy to Exemption 2 "in its entire `low 2' aspect").

rule or internal practice of an agency or be sufficiently related to such a rule or practice.[16] Courts have included a variety of trivial administrative information within the "low 2" aspect of Exemption 2's coverage. For example, it has been held that routine internal personnel matters, such as performance standards and leave practices, are included within the scope of the exemption.[17] Personnel matters of greater public interest, however, such as the honor code proceedings at issue in Department of the Air Force v. Rose,[18] are not so covered.[19]

In the past, Exemption 2 was construed to permit the nondisclosure of mundane, yet far more pervasive administrative data--such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other similar administrative markings.[20] It also was held to jus-

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[16] See Schwaner v. Department of the Air Force, 898 F.2d 793, 795 (D.C. Cir. 1990); see also FOIA Update, Spring/Summer 1990, at 2.

[17] See, e.g., Small v. IRS, 820 F. Supp. 163, 168 (D.N.J. 1992) (employee service identification numbers); Pruner v. Department of the Army, 755 F. Supp. 362, 365 (D. Kan. 1991) (Army regulation concerning discharge of conscientious objectors); Federal Bureau of Investigation Agents Ass'n v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,058, at 83,566-67 (D.D.C. Jan. 13, 1983) (information relating to performance ratings, recognition and awards, leave practices, transfers, travel expenses, and allowances); NTEU v. United States Dep't of the Treasury, 487 F. Supp. 1321, 1324 (D.D.C. 1980) (bargaining history and IRS interpretation of labor contract provisions); Frank v. United States Dep't of Justice, 480 F. Supp. 596, 597-98 (D.D.C. 1979) (FBI special agents' complaints of mismanagement about personnel matters such as leave, work assignments and overtime, as well as information about ensuing investigation).

[18] 425 U.S. at 365-70.

[19] See, e.g., Vaughn v. Rosen, 523 F.2d 1136, 1140-43 (D.C. Cir. 1975) (evaluations of how effectively agency policies were being implemented); Globe Newspaper Co. v. FBI, No. 91-13257, slip op. at 6-8 (D. Mass. Dec. 29, 1992) (amount paid to FBI informant found to be personally involved in "ongoing criminal activities"); News Group Boston, Inc. v. National R.R. Passenger Corp., 799 F. Supp. 1264, 1266-68 (D. Mass. 1992) (disciplinary actions taken against Amtrak employees), appeal dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992); North v. Walsh, No. 87-2700, slip op. at 3 (D.D.C. June 25, 1991) (travel vouchers of senior officials of Office of Independent Counsel); Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 16, 18 (D. Ariz. July 9, 1987) (agency response to MSPB appeal and administrative inquiry memorandum concerning death of FBI agent), motion to vacate denied (D. Ariz. Dec. 22, 1987); FBI Agents Ass'n, 3 Gov't Disclosure Serv. at 83,566-67 (standards of conduct, grievance procedures, EEO procedures); Ferris v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,084, at 82,363 (D.D.C. Dec. 23, 1981) (SES performance objectives).

[20] See, e.g., Hale v. United States Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) ("administrative markings and notations on documents; room numbers,

(continued...)

tify the withholding of more extensive and substantive portions of administrative records and, most significantly, entire documents.[21]

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[20](...continued)
telephone numbers, and FBI employees' identification numbers; a checklist form used to assist special agents in consensual monitoring; personnel directories containing the names and addresses of FBI employees; and the dissemination page of Hale's `rap sheet'"), cert. granted, vacated & remanded on other grounds, 509 U.S. 918 (1993); Lesar, 636 F.2d at 485-86 (informant codes held "a matter of internal significance in which the public has no substantial interest [and which] bear no relation to the substantive contents of the records released"); Scherer v. Kelley, 584 F.2d 170, 175-76 (7th Cir. 1978) ("file numbers, initials, signature and mail routing stamps, references to interagency transfers, and data processing references"); Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978) ("file numbers, routing stamps, cover letters and secretary initials"); Maroscia v. Levi, 569 F.2d 1000, 1001-02 (7th Cir. 1977) (markings used to maintain control of investigation); Branch v. FBI, 658 F. Supp. 204, 208 (D.D.C. 1987) ("There is no question that [source symbol and file numbers are] trivial and may be withheld as a matter of law under Exemption 2."). But see Badalamenti v. United States Dep't of State, 899 F. Supp. 542, 547 (D. Kan. 1995) (agency's "bare assertion fails to demonstrate that the file and case numbers relate to an agency rule or practice or are otherwise encompassed within exemption 2"); Manna v. United States Dep't of Justice, 832 F. Supp. 866, 880 (D.N.J. 1993) ("DEA failed to describe or explain what these `internal markings' are . . . [and if they] relate to internal rules or practice and whether these markings constitute trivial administrative matters of no public interest."); Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 57 (D.D.C. 1990) (administrative markings do not "relate to" an agency rule or practice).

[21] See, e.g., Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (internal time deadlines and procedures, recordkeeping directions, instructions on contacting agency officials for assistance and guidelines on agency decisionmaking); Nix, 572 F.2d at 1005 (cover letters protected as matters of merely internal significance); Starkey v. IRS, No. C91-20040, slip op. at 10 (N.D. Cal. Dec. 6, 1991) (facsimile cover sheets, transcript, and employee travel information); Wilson v. Department of Justice, No. 87-2415, slip op. at 5-6 (D.D.C. June 13, 1991) (State Department transmittal slips from low-level officials); Barrett v. OSHA, No. C2-90-147, slip op. at 3-4 (S.D. Ohio Oct. 18, 1990) (administrative steps followed by OSHA prior to issuance of citation are internal); KTVY-TV v. United States Postal Serv., No. 87-1432, slip op. at 15 (W.D. Okla. May 4, 1989) (computerized list of evidence gathered during investigation of shooting incident), aff'd on other grounds, 919 F.2d 1465 (10th Cir. 1990); Cox v. United States Dep't of Justice, No. 87-158, slip op. at 3 (D.D.C. Nov. 17, 1987) (investigation code name, supervising unit, details of property, and funding); Dickie v. Department of the Treasury, No. 86-649, slip op. at 3 (D.D.C. Mar. 31, 1987) (case-reporting procedures); Heller v. Marshals Serv., 655 F. Supp. 1088, 1092 (D.D.C. 1987) (brief and personal intra-agency memorandum); Martinez v. FBI, No. 82-1547, slip op. at 10-11 (D.D.C. Dec. 19, 1985) (43 pages of postal inspector caseload management and timekeeping records).

One type of administrative record--federal personnel lists--caused the courts to struggle with the problem of determining when the threshold Exemption 2 requirement of being "related to" internal agency rules and practices is satisfied. The personal privacy protection of Exemption 6--successfully invoked to protect the names and home addresses of federal employees--is generally unavailable to protect the names and duty addresses of federal employees inasmuch as there ordinarily is no privacy interest in such information.[22]

In 1990, the Court of Appeals for the District of Columbia dispositively addressed the possible protection of federal personnel lists under Exemption 2 in Schwaner v. Department of the Air Force.[23] In a two-to-one decision, it held that a list of the names and duty addresses of military personnel stationed at Bolling Air Force Base does not meet the threshold requirement of being "related solely to the internal rules and practices of an agency."[24] The panel majority ruled that "the list does not bear an adequate relation to any rule or practice of the Air Force as those terms are used in exemption 2."[25] In so doing, it gave a new, stricter interpretation to the term "related to" under Exemption 2--holding that if the information in question is not itself actually a "rule or practice," then it must "shed significant light" on a "rule or practice" in order to qualify.[26] The D.C. Circuit concluded that "lists do not necessarily (or perhaps even normally) shed significant light on a rule or practice; insignificant light is not enough."[27] Thus, under Schwaner, Exemption 2 is not available to shield agencies from the burdens of processing requests for federal personnel lists.[28]

The second part of the "low 2" formulation concerns whether there "is a

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[22] See, e.g., FLRA v. United States Dep't of the Treasury, 884 F.2d 1446, 1452-53 (D.C. Cir. 1989); see also FOIA Update, Sept. 1982, at 3; FOIA Update, Summer 1986, at 3-4 (recognizing exceptions for law enforcement and certain military personnel).

[23] 898 F.2d 793 (D.C. Cir. 1990).

[24] Id. at 794.

[25] Id.

[26] Id. at 797; see also Audubon Soc'y v. United States Forest Serv., 104 F.3d 1201, 1204 (10th Cir. 1997) (concluding that maps of habitats of owls deemed "threatened" under Endangered Species Act are not sufficiently related to internal personnel rules and practices).

[27] Schwaner, 898 F.2d at 797; see also DeLorme Publ'g Co. v. NOAA, 917 F. Supp. 867, 876 (D. Me. 1996) ("Nothing in Exemption 2 supports the proposition that government `information may be withheld simply because it manifests an agency practice of collecting the information.'" (quoting Schwaner)), appeal dismissed per stipulation, No. 96-1601 (1st Cir. July 8, 1996).

[28] See FOIA Update, Spring/Summer 1990, at 2 (modifying prior guidance in light of controlling nature of D.C. Circuit ruling, as circuit of "universal venue" under FOIA).

genuine and significant public interest" in disclosure of the records requested.[29] An illustration of how this "public interest" delineation has been drawn can be found in a decision in which large portions of an FBI administrative manual were ruled properly withholdable on a "burden" theory under Exemption 2, but other portions, because of a discerned "public interest" in them, were not.[30] This decision is reflective of the D.C. Circuit's admonition in Founding Church of Scientology v. Smith[31] that "a reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interests."[32]

The nature of this "public interest" in "low 2" cases was affected by the Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press.[33] In Reporters Committee, the Supreme Court held that the "public interest" depended on the nature of the document sought and its relationship to "the basic purpose [of the FOIA] `to open agency action to the light of public scrutiny.'"[34] The Court concluded that the FOIA's "core purposes" would not be furthered by disclosure of a record about a private individual, even if it "would provide details to include in a news story, [because] this is not the kind of public interest for which Congress enacted the FOIA."[35] It also emphasized that a particular FOIA requester's intended use of the requested

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[29] Rose, 425 U.S. at 369.

[30] Agents Ass'n, 3 Gov't Disclosure Serv. at 83,565-66; see also Berg v. Commodity Futures Trading Comm'n, No. 93-C6741, slip op. at 10 (N.D. Ill. June 23, 1994) (applying Rose and finding public interest in "material dealing with how a public-funded agency handles inquiries from the public and responds to the public"); Church of Scientology v. IRS, 816 F. Supp. 1138, 1149 (W.D. Tex. 1993), appeal dismissed per stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993) ("public is entitled to know how IRS is allocating" taxpayers' money as it pertains to IRS advance of travel funds to employees); News Group Boston, 799 F. Supp. at 1267 (finding legitimate public interest in disclosure of case handling statements despite agency fear that information may be misunderstood or misinterpreted); Globe Newspaper, No. 91-13257, slip op. at 6 (D. Mass. Dec. 29, 1992) (amount paid to FBI informant personally involved in continuing criminal activity should be disclosed because it "falls squarely within the parameters set by Rose"); Singer v. Rourke, No. 87-1213, slip op. at 3-4 (D. Kan. Dec. 30, 1988) (holding Exemption 2 inapplicable to documents relating to investigation of sexual and racial harassment at Air Force facility, because public has "genuine and significant interest" in learning whether the government has engaged in "such noxious activity").

[31] 721 F.2d 828 (D.C. Cir. 1983).

[32] Id. at 830-31 n.4.

[33] 489 U.S. 749 (1989).

[34] Id. at 772 (quoting Rose, 425 U.S. at 372).

[35] Id. at 774.

information "has no bearing on the merits of his or her FOIA request" and that FOIA requesters therefore should be treated alike.[36] (See further discussion of this case under Exemption 6, The Reporters Committee Decision, below.)

Although the Supreme Court's decision in Reporters Committee is based on an analysis of Exemption 7(C), its interpretation of what constitutes "public interest" under the FOIA logically may be applicable under Exemption 2 as well.[37] After Reporters Committee, courts increasingly focused upon the lack of any "legitimate public interest" when applying this aspect of the exemption to information found to be related to an agency's internal practices.[38] Indeed, a number of courts had already been taking such an approach in analyzing "low 2" cases before Reporters Committee.[39] Nevertheless, there remains the fact that this aspect of Exemption 2 simply does not cover any information in which there is "a genuine and significant public interest."[40]

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[36] Id. at 771; see also FOIA Update, Spring 1989, at 5.

[37] See Schwaner, 898 F.2d at 800-01 (Revercomb, J., dissenting on issue not reached by majority) (relying on Reporters Comm. "core purposes" analysis and finding no "meaningful" public interest in disclosure of names and duty addresses of military personnel).

[38] See Hale, 973 F.2d at 902 (finding no public interest in administrative markings and notations, personnel directories containing names and addresses of FBI employees, room and telephone numbers, employee identification numbers, consensual monitoring checklist form, rap sheet-dissemination page); News Group Boston, 799 F. Supp. at 1268 (holding no public interest in payroll and job title codes); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 390-93 (W.D.N.Y. 1992) (declaring no public interest in "soundex" encoding of alien's family name; whether or not alien is listed in Border Patrol Lookout Book; codes used to identify deportability; narratives explaining circumstances of apprehension; internal routing information).

[39] See, e.g., Martin, 686 F.2d at 34 (Exemption 2 "designed to screen out illegitimate public inquiries into the functioning of an agency"); Lesar, 636 F.2d at 485-86 (public has "no legitimate interest" in FBI's mechanism for internal control of informant identities); Struth v. FBI, 673 F. Supp. 949, 959 (E.D. Wis. 1987) (plaintiff offered no evidence of public interest in source symbol or source file numbers); Fiumara v. Higgins, 572 F. Supp. 1093, 1102 (D.N.H. 1983) (plaintiff failed to show legitimate public or private interest in disclosure of agency's law enforcement computer system information); Texas Instruments, Inc. v. United States Customs Serv., 479 F. Supp. 404, 406-07 (D.D.C. 1979) (internal access or report numbers of no value to plaintiff). But see Tax Analysts v. United States Dep't of Justice, 845 F.2d 1060, 1064 n.8 (D.C. Cir. 1988) (finding Exemption 2 inapplicable, without discussion, because of "public's obvious interest" in agency copies of court opinions), aff'd on other grounds, 492 U.S. 136 (1989).

[40] Rose, 425 U.S. at 369; see also FOIA Update, Winter 1984, at 11 (emphasizing "low threshold" for disclosure of such information).

Moreover, in October 1993, in conjunction with the President's call for more openness in government,[41] the Attorney General established new standards of government openness that strongly guide agency decisionmaking under the FOIA toward the Act's goal of maximum responsible disclosure.[42] The cornerstone of this new FOIA policy is the "foreseeable harm" standard, which the Attorney General's FOIA Memorandum sets forth as follows:

> In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.[43]

When "only a government interest would be affected" by a FOIA disclosure,[44] as is entirely the case with "low 2" information, there is a great potential for discretionary disclosure of such material.[45] Furthermore, as a matter of longstanding policy, agencies have been encouraged to release "low 2" information inasmuch as very often it is less burdensome, or of relatively negligible burden, for them to do so.[46] Accordingly, nearly all administrative information covered solely by the "low 2" part of Exemption 2 should now be appropriate for discretionary disclosure under Attorney General Reno's FOIA Memorandum.[47]

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[41] President's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 3.

[42] Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993) [hereinafter Attorney General Reno's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall 1993, at 4-5.

[43] Id. at 4; see also FOIA Update, Spring 1997, at 1 (describing Attorney General's reiteration of importance of "foreseeable harm" standard to federal agencies in order to promote further discretionary disclosure in agency decisionmaking).

[44] Id.

[45] See FOIA Update, Spring 1994, at 3 (discussing application of "foreseeable harm" standard through discretionary disclosure).

[46] See, e.g., Fonda v. CIA, 434 F. Supp. 498, 503 (D.D.C. 1977) (where administrative burden is minimal and it would be easier to release material, policy underlying Exemption 2 does not permit withholding); see also FOIA Update, Winter 1984, at 11 (advising agencies to invoke exemption only where doing so truly avoids burden).

[47] See Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5; see also FOIA Update, Spring 1994, at 3

(continued...)

(For a further discussion of discretionary disclosure, see Discretionary Disclosure and Waiver, below.)

"High 2": Risk of Circumvention

The second category of information covered by Exemption 2--internal matters of a more substantial nature the disclosure of which would risk the circumvention of a statute or agency regulation--has generated considerable controversy over the years. In Department of the Air Force v. Rose,[48] the Supreme Court specifically left open the question of whether such records fall within Exemption 2 coverage. Most of the cases first developed this aspect of the exemption in the context of law enforcement manuals containing sensitive staff instructions. For example, the position adopted by the Court of Appeals for the Eighth Circuit on this subject is that Exemption 2 does not relate to such matters, but that section (a)(2)(C) of the FOIA,[49] which arguably excludes law enforcement manuals from the automatic disclosure provisions of the FOIA, bars disclosure of manuals whose release to the public would significantly impede the law enforcement process.[50] Although tacitly approving the Eighth Circuit's argument, the Courts of Appeals for the Fifth and Sixth Circuits have an alternative rationale for withholding law enforcement manuals--disclosure would allow persons "simultaneously to violate the law and to avoid detection"[51] by impeding law enforcement efforts.[52]

The majority of the courts in other circuits, however, have placed greater weight on the House Report in this respect and accordingly have held that Exemption 2 is applicable to internal administrative and personnel matters, including law enforcement manuals, to the extent that disclosure would risk circumvention of an agency regulation or statute or impede the effectiveness of an agency's law enforcement activities.[53]

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[47](...continued)
(distinguishing between "low 2" and "high 2" information in connection with discretionary disclosure).

[48] 425 U.S. 352, 364, 369 (1976).

[49] 5 U.S.C. § 552(a)(2)(C) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[50] See Cox v. Levi, 592 F.2d 460, 462-63 (8th Cir. 1979); Cox v. United States Dep't of Justice, 576 F.2d 1302, 1306-09 (8th Cir. 1978).

[51] Hawkes v. IRS, 467 F.2d 787, 795 (6th Cir. 1972).

[52] See id.; Sladek v. Bensinger, 605 F.2d 899, 902 (5th Cir. 1979).

[53] See, e.g., Hardy v. ATF, 631 F.2d 653, 656 (9th Cir. 1980); Caplan v. ATF, 587 F.2d 544, 547 (2d Cir. 1978); Wilder v. IRS, 607 F. Supp. 1013, 1015 (M.D. Ala. 1985); Ferri v. Bell, No. 78-841, slip op. at 7-9 (M.D. Pa. Dec. 15, 1983); Fiumara v. Higgins, 572 F. Supp. 1093, 1102 (D.N.H. 1983).

The Court of Appeals for the District of Columbia Circuit adopted this majority approach when the full court addressed the issue in Crooker v. ATF, a case involving a law enforcement agents' training manual.[54] Although not explicitly overruling its earlier en banc decision in Jordan v. United States Department of Justice, which held that guidelines for the exercise of prosecutorial discretion were not properly withholdable,[55] the en banc decision in Crooker specifically rejected the rationale of Jordan that Exemption 2 cannot protect law enforcement manuals or other documents whose disclosure would risk circumvention of the law.[56]

In Crooker, the D.C. Circuit fashioned a two-part test for determining which sensitive materials are exempt from mandatory disclosure under Exemption 2. This test requires both:

(1) that a requested document be "predominantly internal" and

(2) that its disclosure "significantly risks circumvention of agency regulations or statutes."[57]

Whether there is any public interest in disclosure is legally irrelevant under this "anti-circumvention" aspect of Exemption 2.[58] Rather, the concern under "high 2" is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection."[59] Thus, this aspect of Exemption 2 fundamentally rests upon a determination of "foreseeable harm."[60]

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[54] 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc).

[55] 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc).

[56] See 670 F.2d at 1074.

[57] Id. at 1073-74.

[58] See Voinche v. FBI, 940 F. Supp. 323, 328 (D.D.C. 1996), aff'd per curiam, No. 96-5304, 1997 U.S. App. LEXIS 19089 (D.C. Cir. June 19, 1997), petition for cert. filed, 66 U.S.L.W. 3178 (U.S. Sept. 2, 1997) (No. 97-383); Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. 3, 5 (D.D.C. 1987). But see Kaganove v. EPA, 856 F.2d 884, 889 (7th Cir. 1988) (suggesting that document may not meet Crooker test if its purpose was not "legitimate"); Wilkinson v. FBI, 633 F. Supp. 336, 342 (C.D. Cal. 1986) (suggesting that charge that underlying investigation was conducted illegally might render exemption inapplicable); Oatley v. United States, 3 Gov't Disclosure Serv. (P-H) ¶ 83,274, at 84,065 (D.D.C. Aug. 16, 1983) (holding that civil service testing materials satisfy two-part Crooker test, but leaving open possibility that information would not be considered predominantly internal if grounds existed to suspect bias on the basis of race or sex in materials).

[59] Crooker, 670 F.2d at 1054.

[60] See Attorney General's Memorandum for Heads of Departments and

(continued...)

In years past, it was often relatively easy to meet the first part of the Crooker test that the materials be "predominantly internal."[61] The D.C. Circuit established specific guidance on what constitutes an "internal" document in Cox v. United States Department of Justice, which held protectible information that

> does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public. Differently stated, the unreleased information is not "secret law," the primary target of [the FOIA's] disclosure provisions.[62]

Reflecting a measure of deference that is implicitly accorded to law enforcement activities under this substantive aspect of Exemption 2,[63] courts have treated a wide variety of information pertaining to such activities as "internal," including:

(1) general guidelines for conducting investigations;[64]

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[60](...continued)
Agencies regarding the Freedom of Information Act (Oct. 4, 1993) [hereinafter Attorney General Reno's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall 1993, at 4 (establishing "foreseeable harm" standard); see also FOIA Update, Spring 1994, at 3 (observing that harm element is "already built into" this Exemption 2 aspect).

[61] See Kaganove, 856 F.2d at 889 (agency, like any employer, "reasonably would expect" applicant rating plan to be internal); NTEU v. United States Customs Serv., 802 F.2d 525, 531 (D.C. Cir. 1986) (appointment of individual members of lower federal bureaucracy is primarily question of internal significance for agencies involved); Institute for Policy Studies, 676 F. Supp. at 5 ("[I]t is difficult to conceive of a document that is more `predominantly internal' than a guide by which agency personnel classify documents.").

[62] 601 F.2d 1, 5 (D.C. Cir. 1979) (per curiam). See Sousa v. United States Dep't of Justice, Nos. 95-375, 95-410, 1996 U.S. Dist. LEXIS 18627, at *11 (D.D.C. Dec. 9, 1996) (finding that "the exemption only applies to information `used for a predominantly internal purpose'" (quoting Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992))).

[63] See Schwaner v. Department of the Air Force, 898 F.2d 793, 796 (D.C. Cir. 1990) ("Judicial willingness to sanction a weak relation to `rules and practices' may be greatest when the asserted government interest is relatively weighty."); Wiesenfelder v. Riley, 959 F. Supp. 532, 535 (D.D.C. 1997) (pointing out deference accorded law enforcement activities).

[64] See, e.g., PHE, Inc. v. United States Dep't of Justice, 983 F.2d 248, 251 (D.C. Cir. 1993) ("[R]elease of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources
(continued...)

(2) guidelines for conducting post-investigation litigation;[65]

(3) guidelines for identifying law violators;[66]

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[64](...continued)
of information and thus inhibit investigative efforts."); Becker v. IRS, No. 91-C-1203, slip op. at 15 n.1 (N.D. Ill. Mar. 27, 1992) (exemption protects operational rules, guidelines, and procedures for law enforcement investigations and examinations), motion to amend denied (N.D. Ill. Apr. 12, 1993), aff'd in part & rev'd in part on other grounds, 34 F.3d 398 (7th Cir. 1994); Wilder v. Commissioner, 601 F. Supp. 241, 242-43 (M.D. Ala. 1984) (agreement between state and federal agencies concerning when to exchange information relevant to potential violations of tax laws held "predominantly internal" because it did not interpret substantive law, but instead governed exchange of information); Goldsborough v. IRS, No. 81-1939, slip op. at 15-16 (D. Md. May 10, 1984) (protecting law enforcement manual setting out guidelines to be used in criminal investigation); Berkosky v. Department of Labor, No. 82-6464, slip op. at 3 (C.D. Cal. May 2, 1984) (holding that guidance for proper conduct of investigation of government contractor is designed solely to instruct investigators and does not "regulate the public").

[65] See, e.g., Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (exemption protects litigation strategy pertaining to Equal Access to Justice Act because disclosure would render information "operationally useless"); Silber v. United States Dep't of Justice, No. 91-876, transcript at 21 (D.D.C. Aug. 13, 1992) (bench order) (disclosure of agency's fraud litigation monograph would allow access to strategies and theories of government litigation and its efforts to enforce False Claims Act).

[66] See, e.g., Dirksen v. HHS, 803 F.2d 1456, 1458-59 (9th Cir. 1986) (affirming nondisclosure of claims-processing guidelines that could be used by health care providers to avoid audits); Voinche, 940 F. Supp. at 328 (approving nondisclosure of manual describing techniques used by professional gamblers to evade prosecution); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993) ("information about internal law enforcement techniques, practices, and procedures used by the IRS to coordinate the flow of information regarding Scientology" protected); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 393 (W.D.N.Y. 1992) (methods of apprehension and statement of ultimate disposition of case); Williston Basin Interstate Pipeline Co. v. Federal Energy Regulatory Comm'n, No. 88-592, slip op. at 3-4 (D.D.C. Apr. 17, 1989) (portions of audit report held to be "functional equivalent" of investigative techniques manual, and thus protectible under Exemptions 2 and 7(E), because disclosure would reveal techniques used by agency personnel to ascertain whether plaintiff was in compliance with federal law); Fund for a Conservative Majority v. Federal Election Comm'n, No. 84-1342, slip op. at 4 (D.D.C. Feb. 26, 1985) (audit criteria not "secret law" because they merely provide "threshold requirements" for observing public behavior for illegal activity and do not define illegal activity); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405, 412 (D.D.C. 1983) (computer program protected under Exemptions
(continued...)

(4) a study of agency practices and problems pertaining to undercover agents;[67] and

(5) sections of a Bureau of Prisons manual which summarize procedures for security of prison control centers, including escape prevention plans, control of keys and locks within a prison, instructions regarding transportation of federal prisoners, and the arms and defensive equipment inventories maintained in the facility.[68]

In what is perhaps the broadest application of this standard, a law enforcement document distributed to 1700 state, federal, and foreign law enforcement agencies was held to meet the test of "predominant internality" when its dissemination was necessary for maximum law enforcement effectiveness and any access by the general public was strictly denied.[69]

On the other hand, courts have been more reluctant to extend Exemption 2 protections in the non-law enforcement context without first finding that the records at issue are clearly predominantly internal. In 1992, the District Court for the District of Columbia held that a computer algorithm used by the Department of Transportation to determine the safety rating for motor carriers is not purely internal because it is used to determine "whether and to what extent certain violations will have any legal effect or carry any legal penalty."[70] In a second case that year, the same court held that documents relating to the procurement of telecommunications services by the federal government could not qualify as "pri-

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[66](...continued)
2 and 7(E) because it merely instructs computer how to detect possible law violations, rather than modifying or regulating public behavior); Zorn v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,240, at 82,664 (D.D.C. Mar. 19, 1982) (guidelines for identifying tax-protester churches held not "secret law").

[67] See Cox v. FBI, No. 83-3552, slip op. at 1 (D.D.C. May 31, 1984) (holding that report concerning undercover agents had no effect on public and contained no "secret law"), appeal dismissed, No. 84-5364 (D.C. Cir. Feb. 28, 1985).

[68] Miller v. Department of Justice, No. 87-533, slip op. at 1-2 (D.D.C. Jan. 31, 1989); see also Linn v. United States Dep't of Justice, No. 92-1406, slip op. at 40-41 (D.D.C. June 5, 1995) (protecting numerical symbols used for identifying prisoners because release could assist others in breaching prisoners' security); Kuffel v. United States Bureau of Prisons, 882 F. Supp. 1116, 1123 (D.D.C. 1995) (same).

[69] See Shanmugadhasan v. United States Dep't of Justice, No. 84-0079, slip op. at 31-34 (C.D. Cal. Feb. 18, 1986) (portions of DEA periodical discussing drug-enforcement techniques and exchanges of information held protectible).

[70] Don Ray Drive-A-Way Co. v. Skinner, 785 F. Supp. 198, 200 (D.D.C. 1992).

marily" internal because of the project's "massive" scale and significance.[71] In 1994, that court similarly ruled, after in camera review, that two FBI documents could not be withheld as "an internal `rule or practice' of an agency," as such documents pertained to "planning, execution, and review of specific operations."[72] And in a recent decision on this issue, the United States District Court for the District of Oregon held that a daily diary used to verify contract compliance does not contain internal instructions to government officials and therefore may not be withheld under Exemption 2.[73]

In two decisions narrowly construing Exemption 2, the Courts of Appeals for the Ninth and Tenth Circuits have refused to protect maps showing nest site locations of two different species of birds because the documents failed the test of "predominant internality."[74] Declaring that the phrase "internal personnel" modified both "rules" and "practices" of an agency, the Tenth Circuit turned down arguments from the Forest Service that the maps related to agency practices in that they helped Forest Service personnel perform their management duties.[75] Refusing to consider the potential harm from disclosure of the maps, the Tenth Circuit declared that it would "stretch[] the language of the exemption too far to conclude that owl maps `relate' to personnel practices of the Forest Service."[76] In reaching this decision, though, the Tenth Circuit relied on an earlier opinion by the D.C. Circuit,[77] the rationale of which subsequently was specifically rejected by that court.[78]

Agreeing in a related case that such wildlife maps may not be protected from disclosure despite the potential risk of harm from their release, the Ninth Circuit did not explicitly accept the rationale of its circuit neighbor: Declaring

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[71] MCI Telecomms. Corp. v. GSA, No. 89-746, slip op. at 11-12 (D.D.C. Mar. 25, 1992).

[72] Butler v. United States Dep't of Justice, No. 86-2255, slip op. at 17 (D.D.C. Feb. 3, 1994) (finding that documents at issue did "not discuss the implementation of an existing agency procedure or practice, but instead contain[ed] discussions of plans apparently devised to respond to a particular set of circumstances"), appeal dismissed, No. 94-5078 (D.C. Cir. Sept. 8, 1994).

[73] Tidewater Contractors, Inc. v. USDA, No. 95-541, 1995 WL 604112, at *3 (D. Or. Oct. 4, 1995), appeal dismissed, No. 95-36238 (Mar. 14, 1996).

[74] Maricopa Audubon Soc'y v. United States Forest Serv., 108 F.3d 1082 (9th Cir. 1997); Audubon Soc'y v. United States Forest Serv., 104 F.3d 1201 (10th Cir. 1997).

[75] See Audubon Soc'y, 104 F.3d at 1204.

[76] Id.

[77] See id. (citing Jordan v. United States Dep't of Justice, 591 F.2d 753, 764 (D.C. Cir. 1978) (en banc)).

[78] See Crooker, 670 F.2d at 1074.

that the maps bore "no meaningful relationship to the `internal personnel rules and practices' of the Forest Service,"[79] it instead noted that the maps "do[] not tell the Forest Service how to catch lawbreakers [or] tell lawbreakers how to avoid the Forest Service's enforcement efforts," and it thereby specifically distinguished its previous Exemption 2 decisions involving law enforcement records.[80] The Ninth Circuit's decision, thus, leaves room for "high 2" protection of information bearing "law enforcement" significance.[81]

Often the "internality" of the documents is simply assumed; in those cases courts focus on what constitutes circumvention of legal requirements. Most fundamentally, records that reveal the nature and extent of a particular investigation repeatedly have been held protectible on this "circumvention" basis.[82] On a point of increasing significance, the nondisclosure of computer codes used by law

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[79] Maricopa, 108 F.3d at 1086.

[80] Id. at 1087 (distinguishing Hardy, 631 F.2d at 653, and Dirksen, 803 F.2d at 1456).

[81] See id. at 1087 (emphasizing that nest-site information "does not constitute `law enforcement material'" subject to withholding under Exemption 2.)

[82] See, e.g., Juda v. United States Dep't of Justice, No. 94-1521, slip op. at 6 (D.D.C. Mar. 28, 1996) (release of codes would impede effectiveness of law enforcement); Wagner v. DEA, No. 93-2093, 1995 WL 350794, at *1 (D.D.C. May 26, 1995) (release of internal codes could "thwart DEA's investigative and enforcement efforts"); Augarten v. DEA, No. 93-2192, 1995 WL 350797, at *1 (D.D.C. May 22, 1995) (release of drug-, information-, and violator-identification codes would reveal nature and extent of specific investigations); Manna v. United States Dep't of Justice, 832 F. Supp. 866, 872, 880 (D.N.J. 1993) (release of DEA's G-DEP and NADDIS numbers "would impede" investigative and enforcement efforts); Watson v. United States Dep't of Justice, 799 F. Supp. 193, 195 (D.D.C. 1992) (subjects could decode DEA G-DEP and NADDIS numbers and change their activities "so as to evade detection"); Albuquerque Publ'g Co. v. United States Dep't of Justice, 726 F. Supp. 851, 854 (D.D.C. 1989) ("The public has no legitimate interest in gaining information [pertaining to violator and informant codes] that could lead to the impairment of DEA investigations."); Ferri v. Bell, No. 78-841, slip op. at 9, 11 (M.D. Pa. Dec. 15, 1983) (release of charge-out cards for electronic surveillance devices would impede the FBI's law enforcement effectiveness; however, purchase records of electronic surveillance equipment must be released because FBI has not shown similar foreseeable harm); White v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,127, at 83,740 n.6 (D.D.C. Mar. 2, 1983) (release of Bureau of Prisons memorandum regarding telephone surveillance might risk circumvention of agency regulations). But cf. KTVK-TV v. DEA, No. 89-379, slip op. at 1-3 (D. Ariz. Aug. 30, 1989) (ordering disclosure of tape of speech by local police chief, given at seminar sponsored by DEA, which contained remarks on police department programs used or contemplated to discourage illegal drug use and finding that "disclosure of any of these programs would tend to discourage illegal use of drugs").

enforcement agencies that might provide the sophisticated requester with access to information concerning agency investigations stored in a computer system likewise has been upheld on this basis.[83] Nondisclosure of other sensitive computer-related information that might permit unauthorized access to agency communications systems has also been upheld under the same rationale.[84] However, in an exceptional decision, one court refused to apply this aspect of Exemption 2 to procedures designed to protect against states "circumventing" federal audit criteria for welfare reimbursement.[85]

Exemption 2's "circumvention" protection also should be readily applicable to vulnerability assessments, which are perhaps the quintessential type of record warranting protection on that basis; such records generally assess an agency's vulnerability (or that of another institution) to some form of outside interference or harm by identifying those programs or systems deemed the most sensitive and describing specific security measures that can be used to counteract such vulnerabilities.[86] A prime example of vulnerability assessments warranting protection under "high 2" are the computer security plans that all federal agencies

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[83] See, e.g., Dirksen, 803 F.2d at 1459 (protecting instructions for computer coding); Prows v. United States Dep't of Justice, No. 90-2561, 1996 WL 228463, at *2 (D.D.C. Apr. 25, 1996) (protecting internal DEA markings and phrases that could, if released, facilitate improper access to sensitive information); Kuffel, 882 F. Supp. at 1123 (protecting computer and teletype routing symbols, access codes and computer option commands); Beckette v. United States Postal Serv., No. 90-1246-N, slip op. at 8 (E.D. Va. Mar. 11, 1993) (protecting control file which "is a set of instructions that controls the means by which data is entered and stored in the computer"), aff'd, 25 F.3d 1038 (4th Cir. 1994) (unpublished table decision); see also Windels, 576 F. Supp. at 412 (computer program withheld under Exemptions 2 and 7(E)); Kiraly v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 82,465, at 83,135 (N.D. Ohio Feb. 17, 1982) (computer codes withheld under combination of Exemptions 2 and 7(E)), aff'd, 728 F.2d 273 (6th Cir. 1984).

[84] See, e.g., Hall v. United States Dep't of Justice, No. 87-474, slip op. at 4-5 (D.D.C. Mar. 8, 1989) (protecting various items that "could facilitate unauthorized access to [agency] communications systems"); Institute for Policy Studies, 676 F. Supp. at 5 (according Exemption 2 protection to record revealing most sensitive portions of agency system which "could be used to seek out the [system's] vulnerabilities"); see also FOIA Update, Summer 1989, at 3-4. But see Linn, No. 92-1406, slip op. at 40, 46, 53 (D.D.C. June 5, 1995) (refusing to protect agencies' access codes and routing symbols because risk of compromising integrity of recordkeeping system is "insufficient").

[85] Massachusetts v. HHS, 727 F. Supp. 35, 42 (D. Mass. 1989) ("The Act simply cannot be interpreted in such a way as to presumptively brand a sovereign state as likely to circumvent federal law. The second prong of Exemption 2 does not apply when it is [the state] itself that seeks the information.").

[86] See FOIA Update, Summer 1989, at 3-4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two").

are required by law to prepare.[87] In a decision involving such a document, Schreibman v. United States Department of Commerce,[88] Exemption 2 coverage was invoked to prevent unauthorized access to information which could result in "alternation [sic], loss, damage or destruction of data contained in the computer system."[89] It should be remembered, however, that even such a sensitive document must be reviewed to determine whether any "reasonably segregable" portion can be disclosed without harm.[90]

Release of various other categories of information also has been found likely to result in harmful circumvention:

(1) information that would reveal the identities of informants;[91]

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[87] See id. at 4 (citing Computer Security Act of 1987, Pub. L. No. 100-235, 101 Stat. 1724 (1988)).

[88] 785 F. Supp. 164 (D.D.C. 1991).

[89] Id. at 166.

[90] See id.; see, e.g., PHE, 983 F.2d at 252 (remanding for "high 2" segregation; "district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability" (citing Schiller, 964 F.2d at 1210)); Wightman v. ATF, 755 F.2d 979, 982-83 (1st Cir. 1985) (remanding for determination on segregability); see also FOIA Update, Summer/Fall 1993, at 11-12 ("OIP Guidance: The `Reasonable Segregation' Obligation").

[91] See, e.g., Davin v. United States Dep't of Justice, 60 F.3d 1043, 1065 (3d Cir. 1995) (informant codes); Jones v. FBI, 41 F.3d 238, 244 (6th Cir. 1994) (same); Massey v. FBI, 3 F.3d 620, 622 (2d Cir. 1993) (disclosure of informant symbol numbers and source-identifying information "could do substantial damage to the FBI's law enforcement activities"); Lesar v. United States Dep't of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980) (informant codes); Delviscovo v. FBI, 903 F. Supp. 1, 2 (D.D.C. 1995) (agreeing that release of informant codes would frighten informants away), summary affirmance granted, No. 95-5388 (D.C. Cir. Jan. 24, 1997); Pray v. Department of Justice, 902 F. Supp. 1, 3 (D.D.C. 1995) (protecting informant codes), summary affirmance granted on other grounds, No. 95-5383 (D.C. Cir. Nov. 20, 1996); Wickline v. FBI, No. 92-1189, 1994 WL 549756, at *2 n.5 (D.D.C. Sept. 30, 1994) (protection of informant codes held matter of "established law"); Durham v. United States Dep't of Justice, 829 F. Supp. 428, 431 (D.D.C. 1993) (informant symbol numbers), appeal dismissed for failure to timely file, No. 93-5354 (D.C. Cir. Nov. 29, 1994); Stone v. Defense Investigative Serv., 816 F. Supp. 782, 787 (D.D.C. 1993) (code used to evaluate informants), appeal dismissed for failure to prosecute, No. 93-5170 (D.C. Cir. Mar. 11, 1994). But cf. Globe Newspaper Co. v. FBI, No. 91-13257, slip op. at 7-8 (D. Mass. Dec. 29, 1992) (amount paid to FBI informant personally involved in continuing criminal activity ordered released). (See also discussion of Exemption 7(D), below.).

EXEMPTION 2

(2) information that would reveal the identities of undercover agents;[92]

(3) sensitive administrative notations in law enforcement files;[93]

(4) security techniques used in prisons;[94]

(5) agency audit guidelines;[95]

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[92] See Cox v. FBI, No. 83-3552, slip op. at 2 (D.D.C. May 31, 1984) (report concerning FBI's undercover agent program protected because of potential for discovering identities of agents).

[93] See, e.g., Founding Church of Scientology v. Smith, 721 F.2d 828, 831 (D.C. Cir. 1983) (protecting sensitive instructions regarding administrative handling of document); Cappabianca v. Commissioner, United States Customs Serv., 847 F. Supp. 1558, 1563 (M.D. Fla. 1994) (Customs Service file numbers "containing information such as the type and location of the case" protected, because "if the code were cracked, [it] could reasonably lead to circumvention of the law"); Curcio v. FBI, No. 89-941, slip op. at 5 (D.D.C. Nov. 2, 1990) (protecting expense accounting in FBI criminal investigation); Meeropol v. Smith, No. 75-1121, slip op. at 47-48 (D.D.C. Feb. 29, 1984) (release of handling and dissemination instructions could jeopardize means by which FBI transmitted certain sensitive intelligence information), aff'd in part & remanded in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986).

[94] See, e.g., Jimenez v. FBI, 938 F. Supp. 21, 24 (D.D.C. 1996) (approving nondisclosure of criteria for prison gang member classification); Cox v. United States Dep't of Justice, 601 F.2d at 4-5 (weapon, handcuff, and transportation security procedures); Powell v. Department of Justice, No. 86-2020, slip op. at 4 (D.D.C. Oct. 31, 1989) (records relating to prisoner security procedures), summary affirmance granted, No. 89-5447 (D.C. Cir. June 28, 1991); Hall, No. 87-474, slip op. at 4-5 (D.D.C. Mar. 8, 1989) (disclosure of teletype routing symbols, access codes and data entry codes maintained by the Marshals Service "could facilitate unauthorized access to information in law enforcement communications systems, and [thereby] jeopardize [prisoners' security]"); Miller, No. 87-533, slip op. at 1-3 (D.D.C. Jan. 31, 1989) (disclosure of sections of Bureau of Prisons Custodial Manual describing procedures for security of prison control centers would "necessarily facilitate efforts by inmates to frustrate [BOP's] security precautions"); cf. Thornburgh v. Abbott, 490 U.S. 401, 417 (1989) (rejecting constitutional challenge to Bureau of Prisons regulation excluding publications that, although not necessarily likely to lead to violence, are determined by warden "to create an intolerable risk of disorder . . . at a particular prison at a particular time") (non-FOIA case). But see Linn, No. 92-1406, slip op. at 8-9 (D.D.C. Aug. 22, 1995) (rejecting as "conclusory" Bureau of Prisons' claim that release of case summary and internal memoranda would cause harm to safety of prisoners).

[95] See, e.g., Dirksen, 803 F.2d at 1458-59 (internal audit guidelines protected in order to prevent risk of circumvention of agency Medicare reimbursement regulations); Wiesenfelder, 959 F. Supp. at 535 (protecting benchmarks

(continued...)

(6) agency testing materials;[96] and

(7) an agency's unclassified manual detailing the categories of information that are classified and their corresponding classification levels.[97]

Under some circumstances, Exemption 2 may be applied to prevent potential circumvention through a "mosaic" approach--information which would not by itself reveal sensitive law enforcement information can nonetheless be protected to prevent damage that could be caused by the assembly of different pieces of similar information by a requester.[98] This circumstance arose in a case involving a request for "Discriminant Function Scores" used by the Internal

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[95](...continued)
signifying when enforcement action taken, errors identifying agency's tolerance for mistakes, and dollar amounts of potential fines); Archer v. HHS, 710 F. Supp. 909, 911 (S.D.N.Y. 1989) (Medicare reimbursement-review criteria ordered disclosed, but specific number that triggers audit protected); Windels, 576 F. Supp. at 412-13 (computer program containing anti-dumping detection criteria properly withheld). But see Don Ray Drive-A-Way, 785 F. Supp. at 200 (knowing agency's regulatory priorities would allow regulated carriers to concentrate efforts on correcting most serious safety breaches).

[96] See, e.g., Patton v. FBI, 626 F. Supp. 445, 447 (M.D. Pa. 1985) (testing materials withheld under Privacy Act Exemption (k)(6) and FOIA Exemption 2 because release would impair effectiveness of system and give future applicants unfair advantage), aff'd, 782 F.2d 1030 (3d Cir. 1986) (unpublished table decision); Oatley, 3 Gov't Disclosure Serv. at 84,065 (civil service testing materials satisfy two-part Crooker test); see also Kaganove, 856 F.2d at 890 (disclosure of applicant rating plan would render it ineffectual and allow future applicants to "embellish" job qualifications); NTEU, 802 F.2d at 528-29 (disclosure of hiring plan would give unfair advantage to some future applicants); Samble v. United States Dep't of Commerce, No. 192-225, slip op. at 11 (S.D. Ga. Sept. 22, 1994) (release of evaluative criteria would compromise validity of rating process). But see Commodity News Serv. v. Farm Credit Admin., No. 88-3146, slip op. at 13-15 (D.D.C. July 31, 1989) (steps to be taken in selecting receiver for liquidation of failed federal land bank, including sources agency might contact when investigating candidates, not protectible under "high 2" because agency did not demonstrate how disclosure would allow any applicant to "gain an unfair advantage in the . . . process").

[97] Institute for Policy Studies, 676 F. Supp. at 5. But see Wilkinson, 633 F. Supp. at 342 & n.13 (codes that identify law enforcement techniques not protectible under Exemption 2; instead must meet threshold requirement of compilation for law enforcement purposes for protection under Exemption 7(E)).

[98] See, e.g., Jan-Xin Zang v. FBI, 756 F. Supp. 705, 712 (W.D.N.Y. 1991) (source symbol and administrative identifiers withheld on basis that "accumulation of information" known to be from same source could lead to detection); cf. Davin, 60 F.3d at 1065 (remanding for agency to specify content of documents for which it raises "mosaic" argument).

Revenue Service to select tax returns for examination.[99] Although the IRS conceded that release of any one individual's tax score would not disclose how returns are selected for audit, it took the position that the routine release of such scores would enable the sophisticated requester to discern, in the aggregate, its audit criteria, thus facilitating circumvention of the tax laws. The court accepted this rationale as an appropriate basis for affording protection under Exemption 2.[100] In a related case, one court upheld the denial of access to an IRS memorandum containing tolerance criteria used by the agency in its investigations, finding that disclosure would "undermine the enforcement of . . . internal revenue laws."[101]

Although originally, as in Crooker, the "circumvention" protection afforded by Exemption 2 was applied almost exclusively to sensitive portions of criminal law enforcement manuals, it has since been extended to civil enforcement and regulatory matters, including some matters that are not law enforcement activities in the traditional sense.[102] In a pivotal case in this regard, the National Treasury Employees Union sought documents known as "crediting plans," records used to evaluate the credentials of federal job applicants; the Customs Service successfully argued that disclosure of the plans would make it difficult to evaluate the applicants because they could easily exaggerate or even fabricate their quali-

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[99] Ray v. United States Customs Serv., No. 83-1476, slip op. at 8-9 (D.D.C. Jan. 28, 1985).

[100] See id.; see also Novotny v. IRS, No. 94-F-549, slip op. at 6 (D. Colo. Sept. 8, 1994); Burns v. IRS, No. 85-1027, slip op. at 8 (D. Ariz. Oct. 16, 1985), dismissed on procedural grounds, No. 85-2833 (9th Cir. Sept. 12, 1986); Wilder, 607 F. Supp. at 1015; accord Institute for Policy Studies, 676 F. Supp. at 5 (classification guidelines could reveal which parts of sensitive communications system are most sensitive and enable foreign intelligence services to gather related unclassified records and seek out system's vulnerabilities); cf. Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) ("mosaic" analysis in Exemptions 1 and 3 context).

[101] O'Connor v. IRS, 698 F. Supp. 204, 206-07 (D. Nev. 1988). But cf. Archer, 710 F. Supp. at 911 (requiring careful segregation so that only truly sensitive portion of audit criteria is withheld).

[102] See, e.g., Dirksen, 803 F.2d at 1458-59 (guidelines for processing Medicare claims properly withheld when disclosure could allow applicants to alter claims to fit them into certain categories and guidelines would thus "lose the utility they were intended to provide"); Wiesenfelder, 959 F. Supp. at 537-38 (finding trigger figures, error rate tolerances, and amounts of potential fines properly withheld because release would "substantially undermine" agency's regulatory efforts); Archer, 710 F. Supp. at 911 (specific number of "nerve blocks" used by HHS contractor to determine whether health care providers' claims for reimbursement under Medicare should be subjected to greater scrutiny held protectible; disclosure would allow providers "to avoid review and ensure automatic payment by submitting claims below the number . . . scrutinized [by agency's contractor]").

fications, such falsifications would go undetected because the government lacked the resources necessary to verify each application, and unscrupulous future applicants could thereby gain an unfair competitive advantage.[103] The D.C. Circuit approved the withholding of such criteria under a refined application of Crooker, which focused directly on its second requirement, and held that the potential for circumvention of the selection program, as well as the general statutory and regulatory mandates to enforce applicable civil service laws, was sufficient to bring the information at issue within the protection of Exemption 2.[104] The agency demonstrated "circumvention" by showing that disclosure would either render the documents obsolete for their intended purpose, make the plan's criteria "operationally useless" or compromise the utility of the selection program.[105]

This approach was expressly followed by the Court of Appeals for the Seventh Circuit in Kaganove to withhold from an unsuccessful job applicant the agency's merit promotion rating plan on the basis that disclosure of the plan "would frustrate the document's objective [and] render it ineffectual" for the very reasons noted in the NTEU case.[106] More recently, the District Court for the District of Columbia permitted the Department of Education to withhold information consisting of trigger figures, error rates, and potential fines that provide "internal guidance to staff about how, when, and why they should concentrate their regulatory oversight."[107] The court agreed with the agency that "[g]iving institutions the wherewithal to engage in a cost/benefit analysis in order to choose their level of compliance would substantially undermine [its] regulatory efforts and thwart its program oversight."[108]

It is noteworthy that the Seventh Circuit in Kaganove,[109] the Ninth Circuit in Dirksen,[110] and the D.C. Circuit in NTEU[111] all reached their results even in the absence of any particular agency regulation or statute to be circumvented. Thus,

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[103] NTEU, 802 F.2d at 528-29.

[104] Id. at 529-31.

[105] Id. at 530-31; cf. United States Dep't of Justice v. FLRA, 988 F.2d 1267, 1269 (D.C. Cir. 1993) (crediting plans also held exempt from disclosure under Federal Service Labor-Management Relations Act).

[106] Kaganove, 856 F.2d at 889; see also Samble, No. CV192-225, slip op. at 12 (S.D. Ga. Sept. 22, 1994) (citing Kaganove, 856 F.2d at 889, to protect criteria used to evaluate job applicants).

[107] Wiesenfelder, 959 F. Supp. at 537.

[108] Id. at 537-38.

[109] 856 F.2d at 889.

[110] 803 F.2d at 1458-59.

[111] 802 F.2d at 529-31.

it seems likely that the second part of the Crooker test can properly be satisfied by a showing that disclosure would risk circumvention of general legal requirements,[112] so long as there is a specific determination of "foreseeable harm" in each instance.[113]

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[112] See NTEU, 802 F.2d at 530-31 ("Where disclosure of a particular [record] would render [it] operationally useless, the Crooker analysis is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure."); Knight v. DOD, No. 87-480, slip op. at 4 (D.D.C. Feb. 11, 1988) (memorandum detailing specific inventory audit guidelines held protectible because disclosure "would reveal Department of Defense rationale and strategy" for audit and would "create a significant risk that this information would be used by interested parties to frustrate ongoing or future audits"); Boyce v. Department of the Navy, No. 86-2211, slip op. at 2 (C.D. Cal. Feb. 17, 1987) (withholding routine hearing transcript under Exemption 2 where disclosure would circumvent terms of mere contractual agreement entered into under labor-relations statutory scheme); see also FOIA Update, Summer 1989, at 4.

[113] See Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5; see also FOIA Update, Summer/Fall 1993, at 2 (advising that "foreseeable harm" standard requires process of particularized case-by-case review).